

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEDRICH HILL,

Defendant-Appellant.

UNPUBLISHED

January 20, 2004

No. 243632

Wayne Circuit Court

LC No. 02-000134-01

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of possession of a firearm during the commission of a felony, MCL 750.227b(1), for which the trial court sentenced him to two years' imprisonment. The jury acquitted defendant with respect to the additional charge of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). We affirm.

Defendant's conviction arose out of a police raid on a house in Detroit. During the raid, the police found .91 grams of cocaine on the ground outside the house. A police officer testified that, inside the house, he saw defendant "quickly run to the window and it looked like he threw something out the window and then he quickly had a seat next to a chair that was not too far from the window." Another police officer testified that he found defendant inside the house "quickly sitting down in a chair" and that a revolver was present next to defendant. Defendant admitted that his father and his uncle lived at the house in question and used drugs and that "it might people [sic] they buying it from come through the house or whatever," but he denied that the drugs in question were his or that he threw any drugs out the window. He testified that he was staying at the house in question only temporarily and was simply dozing and watching videos at the time of the police raid.

On appeal, defendant first argues that the trial court erred by instructing the jury that, in order to convict defendant of felony-firearm, they need not also convict him of the underlying possession offense. We review claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). A trial court's instructions "must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them." *Id.* "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id.* at 143-144.

However, defendant did not contemporaneously object to the instruction challenged on appeal. In fact, defense counsel stated “that’s absolutely true,” when he, the prosecutor, and the court were discussing whether the jury could convict defendant of felony-firearm while at the same time acquitting him of the underlying felony. This acquiescence by defense counsel served to extinguish any error with regard to the challenged instruction. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Even assuming that there had been no extinguishment of the alleged error, we would find no basis for reversal under the plain error analysis used for unpreserved allegations of error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To obtain relief under the plain error doctrine, a defendant must demonstrate the existence of a clear or obvious error that affected the outcome of the case. *Id.* We find no clear or obvious error here because the challenged instruction was accurate. Indeed, conviction of the underlying felony is *not* an element of the offense of felony-firearm. See MCL 750.227b(1); see also *People v Lewis*, 415 Mich 443, 455; 330 NW2d 16 (1982). The court in the instant case instructed the jury, in relevant part, as follows:

The defendant is also charged with the separate crime of possessing a firearm at the time he committed or attempted to commit the crime of the unlawful possession of a controlled substance. *To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant committed or attempted to commit the crime of unlawful possession of a controlled substance, which has been defined for you.* It is not necessary, however, that the Defendant be convicted of that crime. Second, that at the time the Defendant committed or attempted to commit that crime he knowingly carried or possessed a firearm. [Emphasis added.]

These instructions accurately reflected the law,¹ and no clear or obvious error is apparent.

Next, defendant argues that the prosecutor committed three instances of misconduct requiring reversal during her closing argument.² “We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first contends that the prosecutor improperly shifted the burden of proof to defendant by stating the following:

He tells us about his dad. His dad has a drug problem. His uncle has a drug problem. All these people. They live at grandma’s house. Partially for sympathy, partially so we go, oh, it was dad’s crack. Honestly, even if you had a drug problem, would you allow your child to go through this because it was your

¹ We note that the challenged instruction conformed to CJI2d 11.34.

² The prosecutor forewent an initial closing argument and spoke only after defense counsel presented his closing argument.

crack? Where is his dad today? Where is his uncle? Where is his grandmother that lived in the house and can probably testify just the same as he did that, yeah, my son uses drugs, yeah, they use drugs, it was my son's drugs. Grandma isn't even here. They're not even here to support him.

Defense counsel objected to this argument, and the court ordered it stricken.

We find no basis for reversal with respect to the statements in question. As noted by the Supreme Court in *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995):

. . . prosecutorial comment that infringes on a defendant's right not to testify may constitute error. However, where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.

See also *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). Here, defendant testified at trial and implicitly suggested that the cocaine may have belonged to his father or uncle, and therefore the prosecutor's comments were proper under *Fields* and *Reid*. Moreover, and significantly, the court ordered the comments stricken, thereby informing the jurors that they were not to consider the comments. Reversal is unwarranted.

Secondly, defendant contends that the prosecutor improperly vouched for the police witnesses by stating that they had no reason to lie and risk getting charged with perjury. After the jury instructions and after the jury left to deliberate, defendant objected to the prosecutor's statements, but the court rejected the objection.

A prosecutor may not ask the jury to convict a defendant on the basis of the prestige of her office, nor may she intimate that she has special knowledge about the truth. See, generally, *People v Bahoda*, 448 Mich 261, 277, 286-287; 531 NW2d 659 (1995). Viewed alone, the prosecutor's comments did appear to skirt the bounds of propriety, because she essentially used the prestige of the police department to vouch for the officers' truthfulness. Nevertheless, we cannot conclude that the remarks in question warrant reversal in this case. Indeed, otherwise improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). The prosecutor, in making the challenged statements, was specifically responding to defense counsel's clear and unmistakable insinuation that the police officers lied during their testimony.³ The prosecutor was entitled to respond to this significant implication. Moreover, the trial court's instructions made clear that the attorney's statements were not evidence in the case.⁴ See *People*

³ At one point, defense counsel explicitly stated that "[t]he officers are being less than honest with you here."

⁴ We note that jurors are presumed to follow the instructions of the trial court. *People v Graves*,
(continued...)

v Long, 246 Mich App 582; 588; 633 NW2d 843 (2001). Under the circumstances and viewed in context, the prosecutor’s comments did not deprive defendant of a fair trial.

Thirdly, defendant argues that the prosecutor improperly “argued [her] case in chief in [her] rebuttal argument.” Defendant has waived this issue for appeal by failing to argue its merits. Indeed, an appellant may not leave it up to this Court to discover and rationalize the basis for his claims. *Watson, supra* at 587.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Richard A. Bandstra

/s/ Patrick M. Meter

(...continued)

458 Mich 476, 486; 581 NW2d 229 (1998).